

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

CARMINE FAZZI,)	
)	
Plaintiff)	
)	
v.)	Civil No. 03-104-B-W
)	
SHERIFF FLANNERY, et al)	
)	
Defendants)	

RECOMMENDED DECISION ON MOTION FOR SUMMARY JUDGMENT

Carmine Fazzi has filed a 42 U.S.C. § 1983 action complaining of the use of force against him during a cell search at the Kennebec County Jail. The defendants have joined in a motion for summary judgment. (Docket No. 16.) Fazzi has not responded to this motion. I now recommend that the Court **GRANT** the motion for summary judgment.

Summary Judgment Standard

At this stage of the dispute, I make my determination based not on the allegations of Fazzi's complaint but on the summary judgment record. The defendants are entitled to summary judgment only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact" and the defendants are "entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A fact is material if its resolution would "affect the outcome of the suit under the governing law," Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986), and the dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party," id. I review the record in the light most favorable to Fazzi, the voiceless opponent of summary judgment, and I indulge all

reasonable inferences in his favor. See Feliciano De La Cruz v. El Conquistador Resort & Country Club, 218 F.3d 1, 5 (1st Cir. 2000).

However, Fazzi has not responded to the defendants' motion or statement of material facts.¹ Consequently, because Fazzi has failed to place a single one of the defendants' facts in dispute I deem the properly supported facts as admitted, see Faas v. Washington County, 260 F. Supp. 2d 198, 201 (D. Me. 2003). Fazzi's pro se status does not excuse him from his obligation to respond, see Parkinson v. Goord, 116 F.Supp.2d 390, 393 (W.D.N.Y 2000) ("[P]roceeding pro se does not otherwise relieve a litigant of the usual requirements of summary judgment"), nor modify the Court's obligation to fairly apply the rules governing summary judgment proceedings, see Fed. R. Civ. P. 56; Dist. Me. Loc. R. Civ. P. 56.

The Eighth Amendment prohibits the unnecessary and wanton infliction of pain by correctional officers. Whitley v. Albers, 475 U.S. 312, 319 (1986). Correctional officers are permitted to use force reasonably "in a good-faith effort to maintain or restore discipline," however this force must not be used "maliciously and sadistically to cause harm." Hudson v. McMillian, 503 U.S. 1, 7 (1992). Hudson explained:

Under the Whitley approach, the extent of injury suffered by an inmate is one factor that may suggest "whether the use of force could plausibly have been thought necessary" in a particular situation, "or instead evinced such wantonness with respect to the unjustified infliction of harm as is tantamount to a knowing willingness that it occur." 475 U.S. at 321. In determining whether the use of force was wanton and unnecessary, it may also be proper to evaluate the need for application of force, the relationship between that need and the amount of force used, the threat "reasonably perceived by the responsible officials," and "any efforts made to temper the severity of a forceful response." Ibid. The absence of serious

¹ I have made every effort to accommodate Fazzi in his efforts to prosecute this suit as a pro se, incarcerated prisoner (see Docket Nos. 6, 10, 11, 13, 15), but this accommodation must be balanced against the need to provide the defendants with a timely adjudication of their summary judgment motion in accordance with the rules.

injury is therefore relevant to the Eighth Amendment inquiry, but does not end it.

Id.; accord Torres-Viera v. Laboy-Alvarado, 311 F.3d 105, 107-08 (1st Cir. 2002).

Undisputed Material Facts

On April 30, 2003, Fazzi was a pre-trial detainee housed in the Kennebec County Jail. Fazzi's housing assignment was in P block on the third floor of the jail. (Def.'s SMF ¶ 1.) On April 30, 2003, the jail's Correctional Emergency Response Team (C.E.R.T.) was assigned to do cell searches in P block. (Id. ¶ 2.) Officer Ryan Ridky, a member of the C.E.R.T. team, was one of the officers performing the cell searches. (Id. ¶ 3.) As Ridky got to Cell P-3, Fazzi asked if he could be present when his cell was searched. Ridky informed Fazzi that this was not permissible, as the Kennebec County corrections officers are instructed to not allow inmates to be in the cell when they are searching as this would present a danger to the corrections officer being in a confined space with an inmate while their attention was focused on searching the cell for contraband. (Id. ¶ 4.) After Fazzi was advised that he could not be in the cell during the search, Fazzi began yelling, "This is fucking bullshit." Fazzi further stated that he had legal paperwork in the cell and again asked Ridky if he could be in the cell during the search. (Id. ¶ 5.) Ridky responded by repeating to Fazzi that he could not be present during the search. Fazzi's anger escalated at this point, and he began yelling and swearing at Ridky. In response, Ridky advised Fazzi that he needed to be quiet and was in the process of attempting to tell Fazzi that he would bring his paperwork out to the day area table where Fazzi was sitting. However, before Ridky could finish his sentence, Fazzi began to yell at him, calling him a "fucking dink." (Id. ¶ 6.) In response to Fazzi's

actions, Ridky advised Fazzi that he needed to get up and follow Ridky as he was going to be escorted out of the P block day room and taken down to a first floor holding cell until such time as the search could be completed. (Id. ¶ 7.)

Fazzi was compliant with the request to leave the block, and left the day room without incident. (Id. ¶ 8.) On entering the corridor outside of P block, which is an unsecured area, Officer Ridky observed Officer Alexander pushing a commissary cart in the corridor. (Id. ¶ 9.) Officer Ridky told Fazzi to stop so that Fazzi would not approach the commissary cart, but Fazzi either ignored or refused to comply with Ridky's order and kept walking. (Id. ¶ 10.) Ridky then placed his right hand on Fazzi's left upper arm to stop him, and in response, Fazzi violently threw Ridky's hand off, yelling at Ridky, "Get your fucking hands off of me." (Id. ¶ 11.) As Fazzi was no longer in a secured area and based upon Ridky's observation that Fazzi's anger was continuing to escalate, Ridky made the determination that Fazzi should be placed in restraints for purposes of being escorted to the intake area for placement in a holding cell. (Id. ¶ 12.) When Ridky attempted to take hold of Fazzi, Fazzi began to struggle. Officers Alexander and Stonier, who were witnesses to Fazzi's behavior, quickly came to Ridky's assistance. (Id. ¶ 13.)

Fazzi was escorted to the CL 301 door, where his hands were placed behind his back, and he was bent forward to be cuffed while Alexander and Stonier controlled his feet. (Id. ¶ 14.) Ridky then placed one handcuff on Fazzi's left hand and realized that Fazzi's right arm would not bend enough to get the other cuff on it. Ridky called for a second set of handcuffs, which were handed to him by Officer Roux. (Id. ¶ 15.) Fazzi was handcuffed using two sets of handcuffs due to what appeared to be an inability of Fazzi to flex his arms. (Id. ¶ 16.) Ridky also observed that Fazzi's wrists were large, so

the handcuffs were set on one click, which is the loosest setting. (Id. ¶ 17.) Ridky, with the assistance of Officers Alexander, Stonier and Roux, escorted Fazzi to the elevator. Fazzi was ordered by Officers Ridky and Alexander to kneel in the corner of the elevator. This is a procedure utilized with unruly inmates for safety reasons and was standard procedure for circumstances such as those presented by Mr. Fazzi's behavior. (Id. ¶ 18.) Fazzi refused to comply with the order to kneel, stating in a loud and aggressive voice that this is "bullshit." The officers, which also included Staff Sergeant Deborah Huard, who had been watching the incident, then took control of Mr. Fazzi's feet and shoulders, and he was placed on the floor on his stomach. (Id. ¶ 19.) Consistent with their training, each officer took a limb on Mr. Fazzi's body and controlled it during the elevator ride down. (Id. ¶ 20.) Upon arriving at the first floor, Officers Alexander and Ridky helped Fazzi to his feet, and he was escorted backward out of the elevator to observation cell two, where Fazzi was instructed to kneel on the bed. Officer Roux then removed the right handcuff off of Fazzi, and Officer Stonier removed the left handcuff. After the removal of the cuffs, the officers present observed that Fazzi was in good physical condition, and he was not requesting medical attention. (Id. ¶ 21.)

Sergeant Deborah Huard is the officer responsible for the training of the Kennebec County C.E.R.T. team. Upon seeing the events transpiring in the third floor corridor of the jail between C.E.R.T. team members and Carmine Fazzi, she decided to observe how the C.E.R.T. team members handled the situation with Inmate Fazzi. She was present as Fazzi was placed in cuffs and taken to the elevator, and she also rode down in the elevator with Fazzi. She observed that the techniques utilized by the C.E.R.T. team members in the elevator to gain control of Fazzi were consistent with how

they had been trained to handle an unruly inmate and were done in a manner which required the use of minimal force so as not to endanger the inmate. (Id. ¶ 22.) At approximately three o'clock on April 30, 2003, an inmate medical request was received from Carmine Fazzi which stated: "I need to be seen as soon as possible. I believe one of my wrists is damaged, my eye is black and blue, and I have abrasions all over my arms." (Id. ¶ 23.) Fazzi was seen by a representative of the jail's medical provider, Jonathan Coggeshall, PA-C, on April 30, 2003. (Id. ¶ 24.) Coggeshall's notes reflect that Fazzi reported complaints of bilateral wrist injuries occurring one hour before the examination, and that Fazzi attributed the injuries to an altercation with corrections officers where Fazzi claimed he was thrown into a wall and his wrists were injured. (Id. ¶ 25.) Fazzi also claimed that someone stepped in the middle of his back. (Id. ¶ 26.) Coggeshall's examination revealed slight edema below the left eye, EOM's intact, and very slight ecchymosis. Fazzi's back was non-tender to palpation, and his range of motion was complete. There were excoriations on Fazzi's wrists bilaterally and also a slight radial displacement of the left wrist which was determined to be chronic and related to prior injury. Fazzi did have some decreased flexion in his wrist due to tenderness; however, the examination of each wrist revealed normal findings. (Id. ¶ 27.) Coggeshall also examined Fazzi's shoulder and elbows and found them to have full range of motion. (Id. ¶ 28.) The assessment which Coggeshall gave after examining Fazzi was that there were contusions to the wrist bilaterally, contusion to the left arm, contusion to the face on the left side, and chronic back pain. (Id. ¶ 29.)

Fazzi was seen by Coggeshall on May 1, 2003, complaining of injuries he sustained to his wrist and the left side of his face. Fazzi indicated that an officer was

pressing on his back, but denied any injury to his back. Coggeshall noted that Fazzi's wrists were slightly abraded bilaterally; however, both wrists were intact neurovascularly. (Id. ¶ 30.) Coggeshall's assessment was a contusion to the left side of the face and contusions to the wrists bilaterally with decreased range of motion to the left wrist. (Id. ¶ 31.)

On May 2, 2003, Fazzi filled out an inmate request form indicating that he received an injury to his right shoulder that had started the day following his assault. (Id. ¶ 32.) Fazzi made no mention of a shoulder injury in either his April 30 or May 1 examinations by Coggeshall. (Id. ¶ 33.) Fazzi claimed a shoulder injury when examined on May 3, 2003, and May 5, 2003. (Id. ¶ 34.) Fazzi's shoulder was examined on May 7, 2003, by Jonathan Coggeshall, whose examination report for that day notes that Fazzi's right shoulder had good range of motion passively, and actively was somewhat tender with abduction and some mild pain with external rotation. He further noted that there was no crepitus and the shoulder was non-tender to palpation. The diagnosis was right shoulder tendinitis. (Id. ¶ 35.)

Fazzi did not bring any complaints regarding his ankles until after he was taken to court on May 5, 2003, at which time he told the medical staff that leg shackles were applied to his ankles when he was brought to court that morning, and they were applied to skin and not over clothing. (Id. ¶ 36.) Fazzi filed a grievance, claiming that his ankles were cut by leg shackles on May 5, 2003, when he was taken to court. (Id. ¶ 37.) As a result of the incident which occurred on April 30, 2003, Fazzi requested a criminal investigation into the conduct of the Kennebec County Jail corrections officers involved. (Id. ¶ 38.)

Corporal Randy Evans investigated on behalf of the Kennebec County Sheriffs Office and concluded after talking with all the officers involved and reading over the statements provided that there was no assault or attempted murder due to the fact that Officers Ridky, Alexander, and Stonier and all other officers involved were well within the use of force guidelines. Officer Ridky not only used minimal force, but he used an extra set of cuffs on Fazzi so he would not be hurt. Fazzi was not shackled, so his claims that his feet were pulled out from underneath him by the shackle chain were completely false. Further, the statements made by other inmates did not support Fazzi when he said that an officer was pushing him the whole way out of P block. Additionally, there was no evidence to support Fazzi's claims that his glasses were damaged during the incident. Finally, the inconsistent statements made by Fazzi did not support action being taken against any officer. (Id. ¶ 39.)

Fazzi, through his wife, requested that the Attorney General's office conduct an investigation into the incident. The Attorney General's office, through Brian MacMaster, responded, stating:

We have recently reviewed the investigation conducted by the Kennebec County Sheriffs Office of your husband's complaint that corrections officers at the Kennebec County facility physically mishandled him. There is nothing in the findings that would provide a basis for this office to initiate its own investigation of the complaint. Accordingly, this office intends on taking no further action.

(Id. ¶ 40.)

Disciplinary charges were brought against Fazzi for the incident which occurred outside of P block on April 30, 2003. Fazzi was found guilty of interfering, disobeying, and obscene or abusive language. He was found not guilty of fighting or attempted

fighting and disrespect. (*Id.* ¶ 43.) Fazzi filed an appeal, which Jail Administrator Raymond Wells denied, stating:

I read and considered your appeal. Any time you cause officers to stop what they are doing to argue or debate, you are interfering. You did this. Officer Clapperton states that he never said you could be in your cell during the search. You also clearly disobeyed the officer's directives. Appeal denied.

(*Id.* ¶ 42.) On May 1, 2003, two days after the subject incident, Fazzi was photographed to show his alleged injuries. (*Id.* ¶ 43.)²

Discussion

Reviewing the merit's of Fazzi's claim,³ these undisputed facts under Whitley support the conclusion that the extent of injury suffered by Fazzi suggests that "the use of force could plausibly have been thought necessary" in a particular situation and it does not evince "such wantonness with respect to the unjustified infliction of harm as is tantamount to a knowing willingness that it occur." 475 U.S. at 321. Some application of force or restraint was, according to these facts, necessary, the amount of force used was in proportion to the need, it was reasonable for the responsible officers to perceive that Fazzi posed a threat if not removed from the vicinity, and efforts were made to

² I recognize that Fazzi has a different version of events in his complaint. If Fazzi had responded to the defendants' motion with appropriate pleadings and evidence to support his version of events, the outcome of this motion might have been different.

³ The defendants contend that this Court cannot grant Fazzi the relief he seeks because to credit any assertion that Fazzi was not disobeying the corrections staff during the cell search incident would imply the invalidity of the disciplinary board findings vis-à-vis the incident, which is not permitted under Edwards v. Balisok, 520 U.S. 641 (1997) and Heck v. Humphrey, 512 U.S. 477 (1994). However, while this position had support at the time the defendants submitted their memorandum, the United States Supreme Court has now held that Heck is not "implicated by a prisoner's challenge that threatens no consequence for his conviction or the duration of his sentence." Muhammad v. Close, ___ U.S. ___, 2004 WL 344163, *1 (Feb. 25, 2004) (per curiam). See also *id.* at *1n.1 ("The assumption is that the incarceration that matters under Heck is the incarceration ordered by the original judgment of conviction, not special disciplinary confinement for infraction of prison rules. This Court has never followed the speculation in Preiser v. Rodriguez, 411 U.S. 475, 499 (1973), that such a prisoner subject to "additional and unconstitutional restraint" might have a habeas claim independent of § 1983, and the contention is not raised by the State here.").

“temper the severity of a forceful response.” Id. With there being no underlying constitutional violation, there can be no supervisory or policy and custom liability. Wilson v. Mendon, 294 F.3d 1, 6 -7 (1st Cir. 2002) (“If ... the officer has inflicted no constitutional harm, neither the municipality nor the supervisor can be held liable.”) (citing City of Los Angeles v. Heller, 475 U.S. 796, 799 (1986)).

Conclusion

For these reasons I recommend that the Court **GRANT** the unopposed motion for summary judgment on behalf of all the defendants.

NOTICE

A party may file objections to those specified portions of a magistrate judge’s report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court’s order.

February 27, 2003.

/s/ Margaret J. Kravchuk
U.S. Magistrate Judge

**U.S. District Court
District of Maine (Bangor)
CIVIL DOCKET FOR CASE #: 1:03-cv-00104-JAW
Internal Use Only**

FAZZI v. FLANNERY, SHERIFF et al
Assigned to: JUDGE JOHN A. WOODCOCK JR.
Referred to: MAG. JUDGE MARGARET J.
KRAVCHUK
Demand: \$
Lead Docket: None

Date Filed: 06/10/03
Jury Demand: Plaintiff
Nature of Suit: 550 Prisoner: Civil
Rights
Jurisdiction: Federal Question

Related Cases: None
Case in other court: None
Cause: 42:1983 Prisoner Civil Rights

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